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No. 80-2043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT No. 26, *et al.*,

Petitioners,

v.

STEVEN A. PICO, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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Interest of the Authors League

The Authors League is the national society of professional authors and dramatists. One of its principal purposes is to express the views of its 10,000 members in cases involving freedom of expression.

The Authors League believes that the Petitioner—School Board's order removing seven books from its high school libraries violated the First Amendment rights of students, teachers, librarians, authors and publishers. It also believes that the proliferation of such book-banning orders

is one of the most serious threats to freedom of expression in the United States.

Consequently, the Authors League—with the consent of the parties—files this brief *amicus curiae* urging the Court to rule that respondents Pico, *et al.*, were entitled to judgment ordering the Island Trees School Board to rescind its ban and return the books to its libraries' shelves or, in the alternative, to affirm the decision of the Court of Appeals remanding the case for trial.

Summary of Argument

The School Board's order removed from its libraries seven books* that many librarians, teachers and critics found to be works of serious literary, artistic and social value. Their values, and the preeminence of several of the banned authors, however, simply highlight the dangerous consequences of the Board's order, Judge Mansfield's dissenting opinion, and the prior decision in *President's Council District 25* v. *Community School Board* No. 25, 457 F.2d 289 (2d Cir. 1972), cert. denied, 409 U.S. 998 (1972).

The Authors League agrees with respondents that the Board's order violated the First Amendment and deprived students of their constitutional right of access to the books in their high school libraries. Respondents' brief discusses the issues thoroughly and most competently, and we will not burden the Court with a prolonged reiteration of the

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* THE FIXER (Bernard Malamud); SLAUGHTERHOUSE FIVE (Kurt Vonnegut); THE NAKED APE (Desmond Morris); DOWN THESE MEAN STREETS (Piri Thomas); BEST SHORT STORIES BY NEGRO WRITERS (Ed., Langston Hughes); GO ASK ALICE (anon.); A HERO AINT NOTHING BUT A SANDWICH (Alice Childress); and A READER FOR WRITERS (ed., Jerome Archer).

arguments, authorities and quotations which support their conclusions.

We do wish to discuss these points:

1. That in view of the First Amendment purposes of school and public libraries, a school board is constitutionally precluded from removing non-obscene books from libraries unless it establishes that the sole reasons for removal were "neutral in First Amendment terms." The Island Trees Board's reasons did not constitutionally entitle it to ban the seven books.

2. Restraints on the circulation of books by libraries and bookstores violate the First Amendment rights of their authors and publishers.

3. Denial of First Amendment protection against the School Board's order will stimulate censorship in school and public libraries—one of the most dangerous threats to the freedoms to publish, distribute and read books, and to spirit of the First Amendment.

POINT I

The First Amendment Function of School Libraries Precluded the Board From Removing the 7 Books.

This appeal does not involve issues concerning the selection or replacement of textbooks. The 7 banned books were library books, not textbooks. Nor does the appeal raise issues concerning a Board's discretion in purchasing books for its libraries. The 7 books already were owned by the District and on the libraries' shelves before this Board acted. Presumably the books had been acquired by the District's professional staff under the aegis of a prior Board.

The primary issue, therefore, is whether the Board was constitutionally precluded from *removing library books* from the collection of its high school library, for the reasons it asserted. This issue, we submit, must be considered in the context of the library's First Amendment function.

(i) *School Libraries Are First Amendment "Marketplaces of Ideas"*

The Island Trees high school library is, like all school and public libraries, "a mighty resource in the marketplace of ideas." *Minarcini, et al.* v. *Strongsville City School District,* 541 F.2d 577, 583 (6th Cir. 1976). Indeed, every library is the quintessential "marketplace of ideas." Within the constraints of its budget, its very purpose is to provide the widest possible range of books, and diversity of expression, ideas and opinions. And so too, "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas *(Red Lion)* . . ." which is based on "the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . *(Associated Press)*." *Red Lion Broadcasting Company, et al.* v. *Federal Communications Commission, et al.,* 395 U.S. 367, 386 (1969); *Associated Press, et al.* v. *United States,* 326 U.S. 1, 20 (1945).

The necessity of preserving full First Amendment protection for the school library *qua* "marketplace of ideas" is emphasized by this Court's statement that nowhere is that protection "more vital than in the community of American schools" to assure "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Keyeshian* v. *Board of Regents,* 385 U.S. 589, 603 (1967).

(ii) *The Board Could Not Remove Books Because It Judged Their Contents Unsuitable*

The Board objected to political, social and religious views expressed in various of the books. This was one of its two justifications for removing them. But it is precisely the purpose of the school library, and the First Amendment, to provide works "antagonistic" to the individual views of Board members and those held by the majority which elected it, as well as books they approve of. The Board's order thus struck at the heart of the First Amendment and the library-marketplace of ideas. It also taught the District's students an egregious lesson . . . contempt and distrust of the fundamental principles of the First Amendment.

Judge Mansfield reasoned that no First Amendment restraint occurred because students were free to discuss the ideas in the banned books, although they could not obtain copies from the library. We disagree. Students were entitled to the First Amendment privilege of reading the authors' expressions of their ideas, opinions and experiences—of acquiring the information, first hand, and judging it themselves. Moreover: the First Amendment protects books and the right to read them, and is not limited to "ideas" they express. The banning order, moreover, was a direct assault on the library's First Amendment function; and it denied a minority, those who wanted to read the books, the right of access to them in the library.

(iii) *The Board Could Not Remove the Books Because of Vulgar or Offensive Language*

None of the books violated New York's statute banning material obscene for minors. The Board, however, concluded that passages containing the word "fuck" and other language it deemed vulgar, and some references to sexual

intercourse, justified removal of the books from the high school library. We submit the Board erred, as did the Court of Appeals in *President's Council District 25, supra.*

If vulgar language or passages on sexual conduct warranted banning books from libraries, a vast array of classics and contemporary works of merit could removed—particularly if school boards applied the policy even-handedly rather than as a pretext for banning books they objected to for other reasons.

Here, the Board was not formulating regulations to prevent high school students from uttering in public places the "four-letter" words many had long-since learned outside the school. The Board was dealing with words printed in books; words and passages reflecting the speech, behavior and experiences of characters, or authors. The First Amendment requires that books be judged as a whole in determining if they are obscene. Certainly, it requires that *non-obscene* books be judged as a whole, when attempts are made to ban them from libraries because of vulgar language or references to sexual intercourse. Judged as a whole, the 7 banned books are works of serious social, literary and artistic value. The First Amendment protects them against restraints on their circulation by the high school library.

(iv) *The Board's Reasons for Banning the 7 Books Were Not "Neutral in First Amendment Terms"*

The Authors League submits that the Court of Appeals, in *Minarcini, et al.* v. *Strongsville City School District, supra,* correctly ruled that a Board could remove books from school libraries only for reasons that were "neutral in First Amendment terms"—wear and tear, obsolescence, or legitimate shortage of shelf space—and not because of any objection to content. Since the actual reasons for

school-board banning orders usually are objection to content, which might easily be concealed behind the pretext of a "neutral" rationalization, we submit that the First Amendment requires a Board to prove by clear and convincing evidence, that it actually ordered a book removal solely for "neutral" reasons—when its order is challenged by students, teachers, parents or others with standing.

POINT II

The Board's Order Violated the First Amendment Rights of Authors and Publishers of the 7 Books.

Bookstores and libraries are indispensable links in the chain of communication between authors and publishers, and those who read their books. Freedom to write and publish a book, and to read it, would be empty formalities if police, district attorneys or school boards could prevent booksellers and libraries from keeping the book on their shelves and distributing it. Therefore, the Court has ruled that the First Amendment's protection "embraces the circulation of books as well as their publication" (*Bantam Books* v. *Sullivan*, 372 U.S. 48, 65; *1963*), and that it protects those who distribute books as well as authors and publishers. (*Smith* v. *California*, 361 U.S. 147, 152; *1959*).

And because restraints on those who circulate books—wholesalers, stores or libraries—also inhibit the rights of the authors and publishers of those works, the Supreme Court has held that they may sue to prevent these unconstitutional restraints on "the circulation" of their books. *Bantam Books* v. *Sullivan, supra.*

The Board's order—officially branding the 7 books unsuitable for high school students—also could inhibit their circulation in other channels. Students may be deterred from buying the books in stores, stores deterred from

stocking them, or parents influenced to prohibit them to their children of high school age. Cf. *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965); *Bantam Books* v. *Sullivan, supra*, p. 67.

POINT III

Denial of First Amendment Protection Against the Board's Order Will Stimulate Censorship of School and Public Libraries.

Book banning, like witch-hunting, is contagious. In *Right to Read Defense Committee, et al.* v. *School Committee of the City of Chelsea, et al.*, 454 F. Supp. 703 (D. Mass. 1978), the District Court said:

> "If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees 'sanitizing' the school library of views divergent from their own is alarming, whether they do it book by book or one page at a time." (454 F. Supp., at p. 714.)

As in the Soviet Union, books will become non-books depending on a new board's lack of tolerance and respect for the principles of the First Amendment.

The banning of a book by one school board will lead to its banning by other boards. The pressures for such censorship are easy to generate. They will be difficult for many boards to resist if courts conclude the First Amendment does not prohibit school or library officials from removing books that offend their own tastes and sensibilities, or those of special interest groups. Inevitably, some boards and librarians will tend to "steer clear" of authors and titles who have been banned elsewhere.

Such censorship at the school board and library board level is one of the most serious threats to the freedoms to publish, distribute and read books. Usually its victims are works of recognized merit by authors of ability and distinction—as is the case here. (A record of contemporary book-banning is published bimonthly in The American Library Association's NEWSLETTER ON INTELLECTUAL FREEDOM.)

First Amendment protection against such book-banning, exemplified by the Island Trees Board's order, is essential to permit school and public libraries to continue functioning as First Amendment "market-places of ideas", disseminating a wide diversity of books, many of them "antagonistic" to the views of the incumbent school board and the majority that elected it.

CONCLUSION

It is respectfully submitted that the School Board's order violated the First Amendment and should be set aside, or in the alternative that the Order of the Court of Appeals should be affirmed.

Respectfully submitted,

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